

A Dr Shaari Isa & Anor v Tan Sri Harris bin Mohd Salleh

B COURT OF APPEAL (MALAYSIA) — CIVIL APPEAL
NO S-02(NCVC)(W)-1362-07 OF 2017
TENGGU MAIMUN, ABANG ISKANDAR AND MARY LIM JJCA
16 JANUARY 2020

C *Civil Procedure — Pleadings — Statement of claim — Plaintiff stated in statement of claim that ten passages in a book written by first defendant contained defamatory imputations — Trial judge clustered the alleged defamatory passages — Whether learned trial judge failed to refer to plaintiff's pleaded assigned meanings of the passages — Whether such failure was fatal — Whether the pleaded assigned meanings of each of the ten passages which plaintiff alleged was*
D *defamatory of him, was not individually proven to be so by plaintiff*

E *Tort — Defamation — Libel — Plaintiff alleged that ten passages in a book written by first defendant contained defamatory imputations — High Court allowed plaintiff's defamatory action against defendants — Whether learned trial judge erred in finding that the ten passages were defamatory — Whether learned judge erred in rejecting defence of justification*

F In the High Court, Tan Sri Harris bin Mohd Salleh ('the plaintiff') had brought an action against the defendants for libel on account of a book titled 'Vendetta and Abuse of Power: Quest for justice in the Land Below The Wind-Political Vindictiveness and Personal Vilification Against Syed Kechik in Sabah [1975–2013]' ('the vendetta book') that was authored by the first defendant. The second defendant was alleged to have requested the first defendant to write the book. The third, fourth and fifth defendants were the printer, publisher, and distributor of the book. The said vendetta book contained serious allegations against the plaintiff as the then Chief Minister of Sabah of committing wrongful and criminal acts including abusing his power to oppress Tan Sri Dato' Syed Kechik bin Syed Mohamad Albukhary. The plaintiff reproduced ten paragraphs of the vendetta book in the statement of claim and pleaded that they contained defamatory imputations. At the end of the case, the High Court allowed the plaintiff's claim with general and aggravated damages against the defendants. Aggrieved by the decision, the defendants filed the present appeal. The plaintiff had also filed a cross-appeal complaining that the decision of the High Court ought to be varied to the extent that the learned trial judge ought to award substantial general and aggravated damages against the first and second defendants respectively after ruling that defence of justification was not proven. The first and second defendants submitted, inter alia, that the learned judge: (a) erred in finding that the ten passages were

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defamatory; and (b) erred in rejecting the defence of justification.

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Held, allowing the appeal with costs of RM50,000 here and below to the defendants; and dismissing the cross-appeal:

- (1) The learned trial judge had clustered the alleged defamatory passages as he deemed fit and went on to consider whether they were defamatory. However, that was not how the plaintiff had pleaded his case. The plaintiff had singled out from the whole book and based his claim for defamation against the defendants premised upon the specific alleged meanings that he had assigned to each of them as evinced by the relevant paragraphs in his statement of claim. Under the law, he had to prove that each of the ten passages was defamatory, as expressed by him in the assigned meanings, as pleaded. In this case, having made his findings on the alleged passages, which he had lumped or clustered together, the learned trial judge did not even refer to the plaintiff's pleaded assigned meanings as could be seen from his omission to allude to that exercise in his grounds of decision. That non-direction by the learned trial judge had amounted to misdirection. In a case for defamation, that must be fatal to the plaintiff's case, as the pleaded assigned meanings of each of the ten passages which the plaintiff alleged was defamatory of him, was not individually proven to be so by the plaintiff (see para 21).
- (2) The second passage regarding the defendants' allegation of corruption and abuse of power by the plaintiff was written based in large measure on the works by Paul Raffaele's book entitled 'Harris Salleh of Sabah'. This work was an authorised biography of the plaintiff whereby Raffaele ('DW1') was paid by the plaintiff USD50,000 for penning such work. DW1 had denied, under oath, the plaintiff's assertion that his work was premised on gossips. DW1 testified that he was an author of international repute. All these were stated by DW1 in his witness statement under oath, to which there was no contrarian view being offered by the plaintiff. The plaintiff was not able to discredit DW1 and his evidence which was credible thus remained intact. In the circumstances, the defence of justification was established and strengthened by the plaintiff's failure to challenge DW1's evidence that showed that the plaintiff was happy with the biography from which the defendants got their source, among others, for materials in writing the said vendetta book within which pages the impugned ten passages were ensconced. The defendants were thus justified by relying on 'Harris Salleh of Sabah' as a defence for the impugned second passage (see paras 31, 34, 37 & 43–44).
- (3) There were also admitted evidence on the very issue of allegation of corruption and abuse of power by the plaintiff which were not considered by the learned trial judge but which were material to the issue of

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- A corruption and abuse of power, the mainstay of the second passage. It was also apparent that the plaintiff was less than honest as a witness on the stand when he was evasive in avoiding answering questions directed to him during cross-examination by learned counsel for the defendants. The court agreed with defendants that had the learned trial judge appreciated and considered the above evidence, he would have found that the pleaded defence of justification would have succeeded. Based on the records of appeal, the court held that a reasonable judge so circumstanced would not have decided the way the learned trial judge had decided (see paras 45, 48 & 52).
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C **[Bahasa Malaysia summary]**

- Di Mahkamah Tinggi, Tan Sri Harris bin Mohd Salleh ('plaintif') telah memfailkan tuntutan terhadap para defendan kerana memfitnah berdasarkan sebuah buku berjudul 'Vendetta and Abuse of Power: Quest for justice in the Land Below The Wind-Political Vindictiveness and Personal Vilification Against Syed Kechik in Sabah [1975–2013]' ('buku vendetta') yang dikarang oleh defendan pertama. Defendan kedua didakwa meminta defendan pertama untuk menulis buku tersebut. Defendan ketiga, keempat dan kelima adalah pencetak, penerbit, dan pengedar buku tersebut. Buku vendetta tersebut mengandungi tuduhan serius terhadap plaintif sebagai Ketua Menteri Sabah ketika itu kerana melakukan kesalahan dan tindakan jenayah termasuk menyalahgunakan kuasanya untuk menindas Tan Sri Dato' Syed Kechik bin Syed Mohamad Albukhary. Plaintif mengeluarkan semula sepuluh perenggan dari buku vendetta tersebut di dalam pernyataan tuntutan dan menyatakan bahawa ia mengandungi tuduhan fitnah. Di akhir kes, Mahkamah Tinggi membenarkan tuntutan plaintif terhadap defendan-defendan dengan ganti rugi am dan teruk. Tidak berpuas hati dengan keputusan tersebut, defendan-defendan mengemukakan rayuan semasa. Plaintif juga telah memfailkan rayuan balas dan mengadu bahawa keputusan Mahkamah Tinggi harus diubah di mana hakim bicara yang bijaksana harus memberikan ganti rugi am dan teruk yang lebih banyak terhadap kedua-dua defendan pertama dan kedua setelah memutuskan pembelaan justifikasi tidak dibuktikan. Defendan pertama dan kedua berhujah, antara lain, bahawa hakim yang bijaksana: (a) terkhilaf apabila mendapati bahawa sepuluh petikan tersebut adalah fitnah; dan (b) terkhilaf dalam menolak pembelaan justifikasi.
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Diputuskan, membenarkan rayuan dengan kos RM50,000 kepada defendan-defendan di mahkamah ini dan mahkamah bawahan; dan menolak rayuan-balas:

- I (1) Hakim bicara yang bijaksana telah mengumpulkan petikan-petikan fitnah yang dianggapnya sesuai dan terus mempertimbangkan sama ada petikan-petikan tersebut adalah fitnah. Namun, bukan itu cara plaintif

memplidkan kesnya. Plaintiff telah memilih dari keseluruhan buku dan mendasarkan tuntutan fitnahnya terhadap defendan-defendan berdasarkan pada dakwaan maksud yang spesifik yang telah diberikan kepada setiap petikan tersebut seperti yang boleh dilihat di dalam perenggan yang relevan dalam pernyataan tuntutan. Di bawah undang-undang, dia harus membuktikan bahawa setiap satu dari sepuluh petikan tersebut adalah fitnah, seperti yang dinyatakan olehnya dalam maksud yang diberikan, seperti yang diplidkan. Dalam kes ini, setelah membuat penemuannya mengenai petikan-petikan tersebut, yang telah disatukan atau dikelompokkan bersama, hakim bicara yang bijaksana tidak juga merujuk kepada maksud yang diberikan seperti yang diplidkan oleh plaintiff sebagaimana yang dapat dilihat dari kegagalannya untuk membuat rujukan tersebut dalam alasan penghakimannya. Ketidakpatuhan oleh hakim bicara yang bijaksana tersebut adalah salah arah. Dalam kes fitnah, salah arah tersebut adalah fatal kepada kes plaintiff, kerana maksud yang diberikan seperti yang diplidkan bagi setiap satu dari sepuluh petikan tersebut yang didakwa oleh plaintiff sebagai fitnah terhadapnya, tidak dibuktikan setiap satu oleh plaintiff (lihat perenggan 21).

- (2) Petikan kedua berkenaan dakwaan defendan-defendan mengenai rasuah dan penyalahgunaan kuasa oleh pihak plaintiff sebahagian besarnya ditulis berdasarkan karya Paul Raffaele yang berjudul 'Harris Salleh of Sabah'. Karya ini adalah biografi sah plaintiff di mana Raffaele ('DW1') dibayar oleh plaintiff sebanyak USD50,000 untuk penulisan karya tersebut. DW1 telah menolak, dengan sumpah, pernyataan plaintiff bahawa karyanya dibuat berdasarkan gosip. DW1 memberi keterangan bahawa dia adalah pengarang yang mempunyai reputasi antarabangsa. Semua ini dinyatakan oleh DW1 dalam keterangan saksinya di bawah sumpah, yang tidak ada pandangan bertentangan yang ditawarkan oleh plaintiff. Plaintiff gagal menggugat kredibiliti DW1 dan oleh itu keterangan DW1 yang kredibel tidak dapat dipertikaikan. Dalam keadaan tersebut, pembelaan justifikasi dibuktikan dan diperkuatkan oleh kegagalan plaintiff untuk mencabar keterangan DW1 yang menunjukkan bahawa plaintiff gembira dengan biografi tersebut yang antara lain menjadi sumber kepada defendan-defendan untuk bahan-bahan dalam menulis buku vendetta tersebut yang mengandungi sepuluh petikan tersebut. Oleh itu, adalah wajar bagi defendan-defendan untuk bergantung kepada 'Harris Salleh of Sabah' sebagai pembelaan untuk petikan kedua tersebut (lihat perenggan 31, 34, 37 & 43–44).
- (3) Petikan kedua berkenaan dakwaan defendan-defendan mengenai rasuah dan penyalahgunaan kuasa oleh pihak plaintiff sebahagian besarnya ditulis berdasarkan karya Paul Raffaele yang berjudul 'Harris Salleh of Sabah'. Karya ini adalah biografi sah plaintiff di mana Raffaele ('DW1')

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- A dibayar oleh plaintiff sebanyak USD50,000 untuk penulisan karya tersebut. DW1 telah menolak, dengan sumpah, pernyataan plaintiff bahawa karyanya dibuat berdasarkan gosip. DW1 memberi keterangan bahawa dia adalah pengarang yang mempunyai reputasi antarabangsa. Semua ini dinyatakan oleh DW1 dalam keterangan saksinya di bawah sumpah, yang tidak ada pandangan bertentangan yang ditawarkan oleh plaintiff. Plaintiff gagal menggugat kredibiliti DW1 dan oleh itu keterangan DW1 yang kredibel tidak dapat dipertikaikan. Dalam keadaan tersebut, pembelaan justifikasi dibuktikan dan diperkuatkan oleh kegagalan plaintiff untuk mencabar keterangan DW1 yang menunjukkan bahawa plaintiff gembira dengan biografi tersebut yang antara lain menjadi sumber kepada defendan-defendan untuk bahan-bahan dalam menulis buku vendetta tersebut yang mengandungi sepuluh petikan tersebut. Oleh itu, adalah wajar bagi defendan-defendan untuk bergantung kepada 'Harris Salleh of Sabah' sebagai pembelaan untuk petikan kedua tersebut (lihat perenggan 31, 34, 37, 43 & 44).]
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Cases referred to

- AEG Carapiet v AY Derderian* AIR [1961] Cal 359, HC (refd)
Browne v Dunn [1893] 6 R 67 (refd)
- E *Chong Swee Huat & Anor v Lim Shiam Ghee & Anor* [2009] 3 MLJ 665, CA (refd)
Chua Beow Huat v Public Prosecutor [1970] 2 MLJ 29; [1968] 1 LNS 24, HC (refd)
Datuk Harris bin Mohd Salleh v. Seck Mun Foo [1999] 2 MLJ 442, HC (refd)
- F *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, HL (refd)
JCT Ltd v Muniandy Nadasan & Ors and another appeal [2016] 6 MLJ 635; [2016] 3 CLJ 692, CA (refd)
Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214, HC (refd)
- G *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, HL (refd)
SB Palmer v AS Rajah & Others [1949] 1 MLJ 6 (refd)
Sim v Stretch [1936] 52 TLR 669, HC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
- H *Thomas v Thomas* 1947 SC (HL) 45; [1947] AC 484, HL (refd)

Legislation referred to

- Defamation Act 1957 s 8
Evidence Act 1950 s 101

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Appeal from: Civil Suit No BKI-22NCVC-113–12 of 2014 (High Court, Kota Kinabalu)

Raymond Szetu (Tiong Jia Yi with him) (Szetu & Co) for the appellant.
Trevor Kenneth Marinking (Marinking & Co) for the respondent.

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Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

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[1] Tan Sri Harris bin Salleh ('the plaintiff') was a member of the Sabah State Cabinet during the administration of the State under the United Sabah National Organization (USNO) and later became the Chief Minister of Sabah under Parti Bersatu Rakyat Jelata Sabah (BERJAYA) administration from 1976–1985. He is now a businessman and a director of several companies.

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[2] Dr Shaari Isa ('the first defendant') is the author of a book entitled 'VENDETTA AND ABUSE OF POWER: Quest for Justice in the Land Below The Wind — Political Vindictiveness and Personal Vilification Against Syed Kechik In Sabah (1975-2013)' ('the said vendetta book') purportedly on the life of the late Tan Sri Dato' Seri Syed Kechik bin Syed Mohamed Albukhary ('the late Syed Kechik') in Sabah.

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[3] Syed Salem Albukhary ('the second defendant') who is the brother of the late Syed Kechik Sabah was claimed to be responsible in the publication of the said vendetta book by providing information and materials for which the first defendant used to write and publish the said vendetta book.

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[4] MPH Group Printing (M) Sdn Bhd ('the third defendant'), MPH Group Publishing Sdn Bhd ('the fourth defendant') and MPH Distributors Sdn Bhd ('the fifth defendant') are respectively the printer, publisher and distributor of the said vendetta book which is available for sale to members of the public at their own establishments and at all major bookstores in Malaysia and Singapore and also for online purchase worldwide at www.mphonline.com for RM99 per copy.

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[5] The said vendetta book was launched on 18 January 2014 by Tan Sri Dr Rais Yatim but the plaintiff only knew about it sometime in late August 2014 when a friend gave him a copy of it and informed the plaintiff that the said vendetta book contained serious allegations against the plaintiff of wrongful and criminal acts as the then Chief Minister of Sabah. This apparently led to the filing of this civil suit by the plaintiff against all the defendants.

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THE PLAINTIFF'S CASE

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[6] In para 13 of the statement of claim ('SOC'), the plaintiff identified ten

- A paragraphs from the book that are defamatory of him. They are found in Chapters 1, 3, 4, 5, 6, 8, 9 and 14. However, the plaintiff also pleaded that the defamatory imputations in the book are not limited to the said ten paragraphs.

Defence of the first and second defendants

- B [7] The pleaded defence is as follows in summary. The first defendant admitted being the author of the said vendetta book. The second defendant did not admit being responsible for its publication. However, the first defendant said that the second defendant gave him materials and money to write the said vendetta book.

- D [8] In respect of the ten paragraphs of the said vendetta book that had been reproduced in the SOC, the defendants pleaded that they should be read in the context of the whole book and that they are 'either true' or are 'expressions of opinion made in good faith without malice and on matters of public interest'.

- E [9] The first and second defendants proceeded to plead facts to justify the claims made in the said vendetta book or otherwise pleaded that the claims are fair comment. Thus, the first and second defendants relied on the defences of justification and fair comment.

Defence of the third to fifth defendants

- F [10] Briefly, the third, fourth and fifth defendants denied that the paragraphs of the said vendetta book reproduced in the SOC bear a defamatory meaning. They also pleaded that they had been assured that the offending paragraphs of the said vendetta book are true in substance and fact or constitute fair comment on a matter of public interest. The defendants also denied that
- G they were motivated by malice to publish and distribute the said vendetta book.

FINDINGS OF THE HIGH COURT

- H [11] Upon hearing the parties, the High Court allowed the plaintiff's claim with general and aggravated damages against the respective defendants as follows:

- I (a) RM50,000 against the first defendant;
- (b) RM100,000 against the second defendant;
- (c) RM100,000 against the third, fourth and fifth defendants;
- (d) 5% interest pa on all damages awarded from date of judgment until full payment;

- (e) a permanent injunction to restrain the defendants/their servants/employees/agents from printing and publishing the said vendetta book/similar label on the plaintiff in any form whatsoever; A
- (f) a mandatory injunction to compel the third, fourth and fifth defendants to forthwith cease selling the said vendetta book and to take reasonable steps to recall the said vendetta book from all bookstores; and B
- (g) costs of RM50,000 payable by the first and second defendants and RM50,000 payable by the third, fourth and fifth defendants respectively.

THE APPEAL

[12] Dissatisfied with the decision, the first and second defendants had filed a notice of appeal for the Court of Appeal evaluation. On the other hand, vide encl 60, the plaintiff had filed a notice of cross-appeal complaining that the decision of the High Court judge ought to be varied to the extent that the learned trial judge ought to award substantial general and aggravated damages against the first and second defendants respectively after ruling that the defence of justification did not prevail and was not proven by the defendants and that it was maliciously done.

[13] We heard this appeal and having considered the submissions of all parties, both oral and written and having perused the records of appeal, we had unanimously allowed the appeal with costs. The order of the High Court dated 19 May 2017 against the first and second defendants was set aside. We also ordered costs of RM50,000 for here and below to the defendants, subject to the payment of allocator fee; and the deposits, if paid, were ordered to be refunded. The cross-appeal by the plaintiff was consequently dismissed as well. We now proffer the reasons for having decided the way we did.

THE DELIBERATION

[14] Before us, numerous grounds were advanced by the first and second defendants being the appellants in this appeal. They can be classified under four heads namely that, the learned judge:

- (a) erred in finding that the ten passages are defamatory;
- (b) erred in rejecting the defence of justification;
- (c) erred in finding that the defence of fair comment was not established; and I
- (d) erred in granting a permanent injunction against printing and publishing the entire book instead of limiting to those passages found to be libelous and bearing a common sting.

A [15] The law on defamation protects people from unjustified character vilification that has the effect of injuring a person/s reputation in the eyes of right-thinking members of society generally (see the case of *Sim v Stretch* [1936] 52 TLR 669 (HL) per Lord Atkin). The learned editors of *Gatley on Libel and Slander* (12th Ed) at p 6, state that the ‘core concern at the heart of

B defamation law is the deterring and remedying of unwarranted harm to reputation’. It is a collective term commonly used to refer to the disparate torts of slander and libel. While the oral defamatory statement is known as slander, a defamatory statement that is captured in a written form is called libel. A

C defendant that is found liable for either form of defamation will invariably be ordered to pay damages to his victim. The amount of the award depends on the seriousness of the injurious statement. In cases where general damages are insufficient, aggravated damages are awarded against a defendant whose defamatory statement has caused untold injury to the plaintiff’s reputation and

D character. A genuine show of remorse and an open and unreserved apology may work in favour of a repentant defendant in mitigation.

[16] Like all civil claims, the plaintiff in a defamation suit bears the burden of having to prove that the impugned statement was defamatory of him, in the

E sense that his reputation has been harmed unfairly by the defendant. The plaintiff will have to prove that in its ordinary and natural meaning, the impugned statement is defamatory of the plaintiff (see the case of *SB Palmer v AS Rajah & Others* [1949] 1 MLJ 6 on the manner to determine whether the impugned articles were capable of a defamatory meaning). If the plaintiff

F succeeds in establishing that factum, the defendant then bears the burden of establishing his pleaded defence of, for instance, justification. Justification essentially means what the defendant has said was the truth. If malice is a relevant consideration, the burden is on the plaintiff to plead malice and henceforth to prove it and not for the defendant to prove the lack of it.

G [17] In this appeal before us, the plaintiff had complained that the defendants had defamed him when they published and circulated the said vendetta book. He had singled out ten passages from the entire book to which he had assigned meanings which were defamatory of him. The plaintiff pleaded

H his case as per his SOC. The plaintiff also prayed for a permanent injunction against the defendants with the view of preventing them from further circulating the book immediately. The defendants pleaded the defence of justification and/or the defence of fair comment.

I [18] Like in all civil cases, a plaintiff is bound by his pleaded case. By that, what is meant is that, in the context of this case, he has to prove each of the alleged meanings assigned by him to each of the ten allegations. Even the defendant is bound, to a certain extent, by the pleaded case of the plaintiff in the sense that he has to craft his defence in order to answer to the plaintiff’s

claim, accordingly. Once that is done, the parameters for the trial of the case are set. No party would be allowed to stray from the set parameters. The confined arena is meant to facilitate a focussed trial well within the set parameter, as agreed by the parties. The court is thus bound in the sense that its mandate to decide is determined by the agreed or non-agreed issues between the parties based on the pleadings after pleadings are closed, or deemed closed. Of course amendments are allowed based on the merits of the application. But, the salient point to always bear in mind is that the court is not permitted to consider matters that are not pleaded by parties, be it by the plaintiff or by the defendant. In *JCT Ltd v Muniandy Nadasan & Ors and another appeal* [2016] 6 MLJ 635; [2016] 3 CLJ 692 Justice David Wong Dak Wah JCA (as His Lordship then was) had occasion to state as follows:

[32] It is undisputed that when evidence was led on this matter of undue preference, there was neither objection nor rebuttal to the evidence proffered by the respondents. That said, we are of the view that this does not help the respondents as the learned judge cannot with respect grant orders which the respondents did not ask for in their prayers. The appellant with respect had no duty to rebut evidence when they are of no relevance to the premised cause of action which in this case is expressly s 304 of the CA, ie, intent to defraud creditors of CNLT.

[19] Reverting as we must, to the factual matrix of this case, the plaintiff had singled out ten passages from the said vendetta book, admittedly written by the first defendant and published by the fourth defendant, as being defamatory of him. He articulated his claim against the defendants in paras 13—14 of his SOC. Paragraph 13 is reproduced like so:

13. The plaintiff avers that the defendants in the said book made baseless allegations therein referring to and/or concerning the plaintiff especially at chapters 1, 3, 4, 5, 6, 8, 9 and 14 which are defamatory of him (hereinafter referred to as the said offending contents) and several parts or portions are produced, but not limited hereto, as follows:

CHAPTER 8: HARRIS SALLEH ON THE WARPATH

This chapter endeavours to look at the malicious acts against Syed Kechik in more detail. It intends to show that these acts were not mere coincidences nor unintentional. They were indeed purposely carried out arising from jealousy, hatred, resentment and vengeance.

(page 259, paragraph 2).

Harris had accused Tun Mustapha of being corrupt and a dictator (undemocratic), but when he was in power he was no better. Like Tun Mustapha, Harris must have enjoyed the grip and pomp of power, and of course the associated wealth that came with it and it looked as if he wanted it to stay that way for a long, long time.

(page 279, paragraph 4)

Harris was too sure of himself but the people began to see his wealth accumulation

- A** and power-crazed ambition. Even before he came into power it was already observed by the Sabah Special Branch that ‘Harris was only concerned with bolstering his own image and fattening his bank account’.
- (page 280, paragraph 2)
- B** This was because Harris was not seen to be quite forthright, and at one time was investigated for maintaining an illegal active interest in his company, and making company decisions while he was chief minister. But the issue was set aside when Dr. Mahathir came to his rescue with the argument that he was no more than a sleeping partner.
- C** (page 280, paragraph 4)
- But it took nine years before the people of Sabah and the federal leaders realized the type of person he was. By that time he had made untold wealth for himself but the rural areas which he had been talking about championing still showed little significant improvement.
- D** (page 281, paragraph 6)
- The people of Sabah had been made to believe that Syed Kechik was an outsider who came to Sabah to ravage the wealth of the state’s forests for his own benefit, Syed Kechik did not ravage the forests of Sabah. Neither did Tun Mustapha. It was in fact Harris who ravaged the forests of Sabah.
- E** (page 282, paragraph 3)

CHAPTER 9: THE KARAMBUNAI AFFAIR

- F** This seems to be yet another impropriety and injustice committed, relating to Bumiputra land ownership and dealing in Sabah where Harris Mohd Salleh was well in the picture. If the Chief Minister was not directly involved in the peninsula land debacle that had brought it to its present sorry state, he was well in the position to help and assist the development of the peninsular land in line with the country’s New Economic Policy, (sic) There was no evidence that Harris Mohd Salleh had tried to do his part in helping the unfortunate.(sic) Bumiputra owners, neither had he shown any interest in safeguarding their rights by advising them and guiding them towards their betterment, and in the process protecting the interests of the state’s Bumiputra community.
- G** (page 304, paragraph 4)
- H** The key to all these was in the hands of Harris. When he was approached to delete Clause 20 of the 1894 Regulations which prohibited any dealing involving the peninsular land with a non-native, he should have steadfastly refused. But he instead, willingly complied.
- I** (page 306, paragraph 3)

CHAPTER 14: ROOTS OF JEALOUSY AGAINST SYED KECHIK

From the time the Zara Project Land was acquired by the Berjaya Party-led government in 1976 and during the whole nine years that it was in power, Harris simply defied the Sabah Land Acquisition Ordinance, first by doing nothing to use

the seized land for 'public purposes' and second, by taking no positive action related to the compensation.

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(page 505, paragraph 5)

The impulsive seizure of the Zara Project Land was a rash act of Harris, an act done without much deep thought or systematic analysis. It was done merely to satisfy his and some people's ego and feeling of despair, defeat and dissatisfaction arising from political events and decisions that were made by the former state government under the leadership of Tun Mustapha'.

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(page 522, paragraph 4)

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[20] Paragraph 14 is reproduced like so:

14. The plaintiff avers that the said offending contents of the said book were maliciously written referring and/or were understood to refer to the plaintiff and by which in their natural and ordinary meaning and/or by inference or by false innuendo means and were understood to mean that:

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14.1 The plaintiff is a corrupted person who had used or abused his position and/or power to amass his wealth and is guilty of criminal acts;

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14.2 The plaintiff engaged in lies, deceit and corrupt practices, which such practices being done in liaison with Government and Government officials;

14.3 The plaintiff had influenced others or officers of the State of Sabah and the judiciary to victimize and/or to deny justice to the late Syed Kechik and/or the second defendant;

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14.4 The plaintiff when he was at the helm of the administration of the State of Sabah committed criminal and corrupt practices to serve or to further his own personal interest only to the detriment of the State and people of Sabah as a whole;

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14.5 The plaintiff was only concerned with bolstering his own image without sincere regards to do development of the rural areas and to Sabah in general;

14.6 The plaintiff ravaged the forest resources of Sabah with the sole ambition to fatten his own bank account or to enrich himself;

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14.7 The plaintiff is a dictator who act according to his emotion and with no regards to the rule of law and/or without morale or principle at all;

14.8 The plaintiff is untrustworthy and is bent on (sic) to abusing his power in order to satisfy his ego and/or to fulfill his need for vengeance by unlawful means; and

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14.9 The plaintiff did nothing in helping and uplifting the well-being of the people of Sabah, in particular the natives and he willfully

A ignored the national New Economic Policy during his nine years tenure as the Chief Minister of Sabah.

B [21] Reverting back to this case, the learned trial judge had clustered the alleged defamatory passages as he deemed fit and went on to consider whether they were defamatory. With respect, that was not how the plaintiff had pleaded his case. Although it was submitted that the whole book written by the first defendant was said to be defamatory against the plaintiff, somehow, he had singled out from the whole book and based his claim for defamation against the defendants premised upon the specific alleged meanings that he had assigned to each of them as evinced by the relevant paragraphs in his SOC. Under the law, he had to prove that each of the ten passages was defamatory, as expressed by him in the assigned meanings, as pleaded. In this case, having made his findings on the alleged passages, which he had lumped or clustered together, the learned trial judge did not even refer to the plaintiff's pleaded assigned meanings as could be seen from his omission to allude to that exercise in his grounds of decision. That non-direction by the learned trial judge has, in our considered view, amounted to misdirection. In a case for defamation, that must be fatal to the plaintiff's case, as the pleaded assigned meanings of each of the ten passages which the plaintiff alleged was defamatory of him, was not individually proven to be so by the plaintiff. In the case of *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 ('Lewis Daily Telegraph Ltd case') at p 235, last paragraph, it was, inter alia, held:

F Held (1) that in a libel action the judge must rule whether the words are capable of bearing each of the defamatory meanings ... put forward by the plaintiff, whether expressly pleaded or not ...

G [22] As such, it was incumbent on the plaintiff to establish, through evidence, each and every of the ten passages to be defamatory (in its assigned meaning) as described by him as appeared in the SOC. At the end of the exercise, the court has to determine whether the plaintiff has succeeded in establishing that assigned meaning to the impugned passage. In this case, the plaintiff had pleaded in paras 14.1–14.9 specific meanings that he had assigned to each of the ten impugned passages. Each of those impugned passages must therefore individually be proven to be defamatory in the manner as described by the plaintiff in his pleadings. As is trite, parties to a civil suit are bound by their pleaded case. When a fact is alleged by a party, then it behoves that party to prove the existence of such fact. Section 101 of the Evidence Act 1950 is clear on that, which basically translates to 'one who alleges, must prove'.

I [23] In respect of the fourth passage, the plaintiff on being allegedly investigated; this was not defamatory. Indeed in *Lewis v Daily Telegraph Ltd* case the English House of Lords found that no guilt of fraud could be inferred from the existence of an inquiry based on the published words that the London

Fraud Squad were ‘inquiring into the affairs of the R Co and its subsidiary companies’. Lord Reid at para 2 of p 260 said:

What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression ... I do not think that he would infer guilt of fraud merely because an inquiry is on foot ... it is the duty of the trial judge to direct the jury that they must not hold it to impute fraud because as a matter of law the paragraph is not capable of having that meaning.

[24] What is significant here is that the plaintiff had assigned specific meanings to each of the ten passages as per sub-paras 14.1–14.9 therein as his pleaded case. That being the case, it thus became the duty of the learned trial judge, in such a circumstance, to just consider whether each of the ten passages was defamatory of the plaintiff, in their ordinary and natural meaning. Indeed, there could be a situation where all of the ten passages were defamatory of the plaintiff. As well, there could be a situation where some of the passages were defamatory while some were not. In all those situations, the findings of the trial judge must be based on the evidence. And in all of those situations, the trial judge must determine as a matter of fact and as a matter of law, whether each of the ten passages was defamatory of the plaintiff because that was how the plaintiff had pleaded his case. Thus, the trial judge must so determine. Of course, in the course of coming to a decision on each of the ten passages, the trial judge is entitled to look at the entire book, but it is not open to him to undertake the exercise which the learned trial judge had undertaken in this case.

[25] We now would allude to what the learned trial judge had done in this case, in respect of the ten passages.

ALLEGED DEFAMATORY PHRASES AS IN PARAGRAPH 13 OF THE SOC	FINDINGS OF HIGH COURT JUDGE
1st Passage ‘CHAPTER 8: HARRIS SALLEH ON THE WARPATH’ ‘This chapter endeavours to look at the malicious acts against Syed Kechik in more detail. It intends to show that these acts were not mere coincidences nor unintentional. They were indeed purposely carried out arising from jealousy, hatred, resentment and vengeance’. (page 259, paragraph 2).	‘[49] In the first paragraph, the first defendant had set the tone for the rest of the book in respect of his characterization of the plaintiff. He said that ‘malicious acts’ against DSK would be examined. The reader is left in no doubt that the perpetrator of the said acts is the plaintiff’.

A	2nd Passage	[50] In the second paragraph, it is said that the plaintiff was no better than Tun Mustafa who was a ‘corrupt’ leader and ‘a dictator’. In other words, it is implied that the plaintiff was also ‘corrupt’ when he ascended to the office of Chief Minister. Unless one accepts (I must add God forbid) that corruption is the norm and that it is acceptable in our national life and polity, to portray someone and especially a person who had held high political office as ‘corrupt’ is certainly defamatory by any reckoning. The first defendant went further in the other paragraphs in accusing the plaintiff of general corruption. He said that the plaintiff was ‘power crazed’ and was concerned with ‘fattening his bank account’ and had amassed ‘untold wealth’ and had ravaged the forest of Sabah’.
B	‘Harris had accused Tun Mustapha of being corrupt and a dictator (undemocratic), but when he was in power he was no better. Like Tun Mustapha, Harris must have enjoyed the grip and pomp of power, and of course the associated wealth that came with it and it looked as if he wanted it to stay that way for a long, long time’. (page 279, paragraph 4)	
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F	3rd Passage	[50]...The first defendant went further in the other paragraphs in accusing the plaintiff of general corruption. He said that the plaintiff was ‘power crazed’ and was concerned with ‘fattening his bank account’ and had amassed ‘untold wealth’ and had ravaged the forest of Sabah’.
G	‘Harris was too sure of himself but the people began to see his wealth accumulation and power-crazed ambition. Even before he came into power it was already observed by the Sabah Special Branch that ‘Harris was only concerned with bolstering his own image and fattening his bank account’. (page 280, paragraph 2)	
H	4th Passage	
I	‘This was because Harris was not seen to be quite forthright, and at one time was investigated for maintaining an illegal active interest in his company, and making company decisions while he was chief minister. But the issue was	

set aside when Dr. Mahathir came to his rescue with the argument that he was no more than a sleeping partner'. (page 280, paragraph 4)		A
5th Passage 'But it took nine years before the people of Sabah and the federal leaders realized the type of person he was. By that time he had made untold wealth for himself but the rural areas which he had been talking about championing still showed little significant improvement'. (page 281, paragraph 6)		B
6th Passage 'The people of Sabah had been made to believe that Syed Kechik was an outsider who came to Sabah to ravage the wealth of the state's forests for his own benefit, Syed Kechik did not ravage the forests of Sabah. Neither did Tun Mustapha. It was in fact Harris who ravaged the forests of Sabah'. (page 282, paragraph 3)		C
7th Passage 'CHAPTER 9: THE KARAMBUNAI AFFAIR' 'This seems to be yet another impropriety and injustice committed, relating to Bumiputra land ownership and dealing in Sabah where Harris Mohd Salleh was well in the picture. If the Chief Minister was not directly involved in the peninsula land debacle that had brought it to its present sorry state, he was well in the position to help and assist the development of the peninsular land in line with the country's New Economic Policy, There was no evidence that Harris Mohd Salleh had tried to do his part in helping the unfortunate. Bumiputra owners, neither had he shown any		D
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A	interest in safeguarding their rights by advising them and guiding them towards their betterment, and in the process protecting the interests of the state's Bumiputra community'. (page 304, paragraph 4)	
B	8th Passage	
C	'The key to all these was in the hands of Harris. When he was approached to delete Clause 20 of the 1894 Regulations which prohibited any dealing involving the peninsular land with a non-native, he should have steadfastly refused. But he instead, willingly complied'. (page 306, paragraph 3)	
D	9th Passage	
E	'CHAPTER 14: ROOTS OF JEALOUSY AGAINST SYED KECHIK' 'From the time the Zara Project Land was acquired by the Berjaya Party-led government in 1976 and during the whole nine years that it was in power, Harris simply defied the Sabah Land Acquisition Ordinance, first by doing nothing to use the seized land for 'public purposes' and second, by taking no positive action related to the compensation'. (page 505, paragraph 5)	[51] The first defendant also alleged that the plaintiff had misused and abused his powers as the Chief Minister of Sabah by compulsorily acquiring the Zara Project Land that belonged to a company in which DSK had interests. In doing so, the plaintiff is alleged to have 'defied' the written law as the acquired land was not used for a 'public purpose' and the owner was not paid any compensation. To my mind, any allegation to the effect that a holder of a public office had defied the written law deliberately to victimize someone out of hatred or jealousy clearly is clearly defamatory under the principles discussed earlier. Right thinking people would certainly hold such a person in contempt for abusing the public office that had been entrusted to him'.
F	10th Passage	
G	'The impulsive seizure of the Zara Project Land was a rash act of Harris, an act done without much deep thought or systematic analysis. It was done merely to satisfy his and some people's ego and feeling of despair, defeat and dissatisfaction arising from political events and decisions that were made by the former state government under the leadership of Tun Mustapha'. (page 522, paragraph 4)	
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[26] As can be seen above, there were no specific findings on the passages, apart from the second passage. What the learned judge had done had been to refer to some words in the various passages and then concluded that they were defamatory. In the main, we agreed with the submissions of learned counsel for the defendants that appeared at paras 24–28 in his amended written submission, as follows:

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24. The legal principles relevant to this appeal are set out as follows.

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25. First, the Respondent is required to identify the exact passage which he says is defamatory of him. ten passages had been identified by the Respondent. The Permanent Injunction against the entire Book is totally unjustified when only the ten passages have been identified by the Respondent in the Statement of Claim.

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26. Second, the Respondent alleged that the ten passages were defamatory of him in their natural and ordinary meaning and/or by inference or by false innuendo. The learned Judge was obliged in law to rule on the natural and ordinary meaning of each of the ten passages. He failed to do so, save for the 2nd Passage.

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27. Third, where the Respondent had not plead innuendo (also known as true innuendo), he was not allowed to rely on any context or extraneous facts to give further meaning to these words in the ten passages. Yet, the learned Judge relied on extraneous facts to give meaning to some of the ten passages (e.g. where the learned Judge combined words from 5th and 6th Passages in order to conclude wrongly that the Appellants had ‘cast the plaintiff as utterly corrupt and capable of ravaging the forest to accumulate untold wealth’). Therefore, he erred.

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28. Fourth, the Respondent is bound by the Pleaded Meanings (shown in Annexure B of this submission, which have not been established.

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[27] With respect, such an approach as was undertaken by the learned trial judge did not go a long way towards proving the pleaded meanings of the individual passages as pleaded by the plaintiff himself. Instead of determining each of the ten passages individually as to whether it was defamatory as per paras 14.1–14.9 of the plaintiff’s SOC, the learned trial judge in this case went on to state that the whole book was defamatory. In our view, as the learned trial judge had not even made a determinative finding of whether each of the ten passages was defamatory of the plaintiff, it would be impossible for him to conclude determinatively that the whole book was defamatory of the plaintiff. Indeed, that was not what the plaintiff had, through his pleadings, prayed for.

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[28] On top of that, the evidence led by the plaintiff did not prove the very gravamen of the alleged defamatory meanings that the plaintiff had assigned to each of the ten passages, as pleaded in para 14.1–14.9 of the plaintiff’s SOC. In the context of how the plaintiff had pleaded his case against the defendants, it was rather clear to us that this finding by the learned trial judge was an over-reach on his part, in that, he had ruled on a matter which was never pleaded by the plaintiff. The pleaded case, if one would recall, had been

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A concerned only with the impugned ten passages.

[29] The error on the part of the learned trial judge was manifest when he made the following findings at para 55 of his grounds of judgment as follows:

B As these ten paragraphs which alleged corruption and abuse of power are interwoven in various parts of the ‘Vendetta book’ which has the victimization of the DSK as the central theme, it must be deemed that not only the ten paragraphs are defamatory of the plaintiff but the entire book as well.

C [30] We had therefore made a finding that the plaintiff had failed to establish that the ten passages that he had alleged to be defamatory against him had been proven, as had been pleaded by him in paras 14.1–14.9 in his SOC.

DEFENCE OF JUSTIFICATION

D [31] We were aware that the defendants had submitted that even if the second passage was defamatory of the plaintiff, such concession was made subject to the huge caveat that the second passage was excused on the defence of justification. To recap, the second passage reads as follows:

E Harris had accused Tun Mustapha of being corrupt and a dictator (undemocratic) but when he was in power he was no better. Like Tun Mustapha, Harris must have enjoyed the grip and pomp of power, and of course the associated wealth that came with it and it looked as if he wanted it to stay that way for a long, long time.

F It was concerned with the defendants’ allegation of corruption and abuse of power by the plaintiff.

G [32] As was alluded to above, it was submitted before us by learned counsel for the defendants that although the second passage may indeed be defamatory, they could avail themselves to the defence of justification, a defence peculiar to defamation action which, if accepted by the court, would completely exonerate the defendants from any liability. It is premised on the truism that truth hurts and that it also bites. In the context of our law, justification as a defence is contained in statute, namely s 8 of the Defamation Act 1957. Under that provision, an impugned statement which is substantially true also qualifies as a defence of justification.

H [33] In line with the standard of proof which a defendant has to discharge in a civil case, that defence succeeds if it establishes a fact that, it is more probable than not, to have happened. That standard of proof, according to the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 is one that is proof on the balance of probability. In this

case, we agreed with the learned counsel for the defendants that his clients had succeeded in discharging the burden incumbent upon them in establishing justification, a defence in the nature of a complete and total exoneration from the claim. In the case of *Chong Swee Huat & Anor v Lim Shiam Ghee & Anor* [2009] 3 MLJ 665, the Court of Appeal through learned Justice Zainun bt Ali (as Her Ladyship then was) held that what was really relevant was actually the truth of the imputation of the overall statement and that therefore the issue was whether in substance and in fact the imputation of the statement were true. On the balance of probability, the defendants in this case had discharged the onus or burden that was placed by law upon their shoulders.

[34] We had considered such submission and we agreed with learned counsel for the defendants that such was the case. We noted that the passage was written based in large measure on the works by Paul Raffaele's book entitled 'Harris Salleh of Sabah'. This work was an authorised biography of the plaintiff whereby Raffaele was paid USD50,000 for penning such work. The full manuscript of the work that subsequently found the bookshelves of many a bookstore was handed over to the plaintiff who completely agreed with it and was happy with it. There were no objections from the plaintiff. When Raffaele offered to revise the book in 2010, the plaintiff turned it down as he was happy with what was already contained in the original work by Raffaele.

[35] It was rather incredible on the part of the plaintiff to assert so late in the day, that he was not happy with Raffaele's biography on him, which he agreed to pay for quite a handsome and handy sum of USD50,000 to Raffaele for writing the same. We said it was so late in the day because the plaintiff only blurted this complaint that the book by Raffaele entitled 'Harris Salleh of Sabah', is but untruths and gossips and that he never authorised such work to be undertaken by Raffaele. He then challenged Raffaele to come to court to answer his challenge. Raffaele did come and testified as the defence witness DW1.

[36] We said it was rather incredible for the plaintiff to sound his unhappiness about DW1's biography on him, as it had taken him so long a time to register his grievance. It was not disputed that DW1 was paid an all paid expense deal to write the biography and that the plaintiff had approved of the manuscript in its entirety without any objections when it was presented to him by DW1 prior to publication of the book. Again, the plaintiff paid for the book's publication. It was later published in the thousands of copies. Copies of the book, 'Harris Salleh of Sabah' were sold and also distributed for free by the plaintiff himself to his friends. That was decades ago. However, it was only during the court proceedings of this case in the High Court, a few years back, that the allegation that the biography by DW1 had been premised on gossips

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- A emerged, coming as it were from the plaintiff who himself had commissioned the biography. One cannot but wonder why the obvious delay to express his grievance about his own authorised biography. Was it because the defendant case had been that the said vendetta book was based mainly on what was contained in 'Harris Salleh of Sabah'? Be that as it may, the lapse of time that
- B had passed since 1985 until 2016 saw no complaint emanating from the plaintiff that the biography that he had approved, was now based upon gossips.

- [37] DW1 accepted the challenge by the plaintiff to appear in court and he denied, under oath, the plaintiff's assertion that his work was premised on gossips. DW1 testified that he was an author of international repute. His latest work entitled 'Among the Great Apes' was published by Harper Collins, a world famous publishing house based in New York, USA. Among his works, mostly non-fiction, an exclusive feature piece written by DW1 had also contributed to Bishop Carlos Belo winning the Nobel Prize in 1996 and that
- C his contribution was acknowledged by Belo himself. He was seriously injured by a Taliban suicide bombing while covering events in Afghanistan but had since recovered and has started writing again. All these were stated by DW1 in his witness statement under oath, to which we saw no contrarian view being offered by the plaintiff.
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- [38] Based on that, how could the plaintiff still maintain that the ten passages, including the second passage, were defamatory of him when he was happy with the entire book and could live with it through the years? An opportunity presented itself to have it revised in 2010 but the plaintiff was content with the original work by DW1. The plaintiff cannot blow hot and cold as he wished.
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- [39] These assertions of facts by DW1 in his examination-in-chief, were never challenged by the plaintiff. It goes to credibility and in defamation cases, that goes a long way.
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- [40] Now, this omission to challenge an adverse piece of evidence coming from a witness called by the opposite party has consequences in a trial based on our adversarial system. The significance of failure to challenge the adverse party's witness whose evidence has the potential of ruining one's very case was first articulated at the highest level in the English House of Lords decision in *Browne v Dunn* [1893] 6 R 67 which is also a defamation case, where it was held by Lord Halsbury as follows:
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- I Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some

questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.

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He would add further that it was not a mere technical rule, but that it was one of essential justice and fair play.

[41] It was later echoed by Mukerjee J of the High Court of Calcutta in India in the case of *AEG Carapiet v AY Derderian* AIR [1961] Cal 359. Learned Justice Sharma would subsequently follow and restate the same applicable and accepted principles in the case of *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; [1968] 1 LNS 24 HC. Ever since, that principle, commonly referred to as the rule in *Browne v Dunn* has found solid footing in this country when it pertains to failure to put a party's case to an adverse witness during cross-examination. The century old rule in *Browne v Dunn* holds that if counsel intends to present evidence contradictory to a witness's testimony as part of his argument, he must put his version of events to the witness during cross-examination.

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[42] In so far as the issue of corruption as it relates to the second passage, we would advert to the cross-examination of Paul Raffaele by learned counsel for the plaintiff that appears at p 000377 Vol 2B — Part B like so:

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PUT: The plaintiff Tan Sri Harris never admitted to you of any corruption.

A: I refer you to passage quote from Datuk Harris where he explained that Donald Stephen after the Independence via the politician and Datuk Yassin, he was in Datuk Yassin's group and he gave him a total of RM300,000.00 every year apart from his minister's salary. Perhaps Datuk Harris don't understand that it was corruption. Nonetheless, common sense would tell you that is corruption when you take the money from the natural resources from the country.

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PUT: That is the political system back then.

A: Who pioneered the system? Would you answer me that?

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Q: Do you agree you did not accuse Tan Sri Harris of dictatorship in your book Harris Salleh of Sabah?

A: As far as I was concerned, he accuses himself by direct quote.

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[43] The plaintiff was not able to discredit DW1 and his evidence which was credible thus remained intact. In the circumstances, the defence of justification erected by the defendants was established and strengthened by the plaintiff's

- A failure to challenge DW1's evidence that showed that the plaintiff was happy with the biography from which the defendants got their source, among others, for materials in writing the said vendetta book within which pages the impugned ten passages were ensconced.
- B [44] The defendants were thus justified by relying on 'Harris Salleh of Sabah' as a defence for the impugned second passage.
- C [45] Apart from the above reason, we agreed with written submissions by the learned counsel for the first and second defendants that appeared in his amended written submission dated 5 November 2018. There were admitted evidence on the very issue of allegation of corruption and abuse of power by the plaintiff which were not considered by the learned trial judge but which were material to the issue of corruption and abuse of power, the mainstay of the second passage. It was also apparent that the plaintiff was less than honest as a witness on the stand when he was evasive in avoiding answering questions directed to him during cross-examination by learned counsel for the defendants.
- D
- E [46] One such example is the refusal of the plaintiff to answer a direct question relating to the matters raised in the reported case of *Datuk Harris bin Mohd Salleh v. Seck Mun Foo* [1999] 2 MLJ 442. Among the findings of facts made by the learned judge in the High Court had been the fact that the respondent had actively practiced deception on the Labuan Golf Club. The decision of the High Court was affirmed by the Court of Appeal as reported in the above cited case. In a reported case involving himself as a party, in fact as the appellant in that case, the plaintiff evaded and/or refused to answer questions related to that case, unless and until he was shown a certified copy of the judgment of the Court of Appeal (see the cross-examination of the plaintiff: notes of proceedings p 66 line 23 to p 67 line 8 and p 67 line 29 to p 68 line 23).
- F
- G (Common Core Bundle 2 p 216 line 23 to p 217 line 8 p 217 line 29 to p 218 line 23). Such conduct of the plaintiff surely ought not to reflect favourably on the demeanour and veracity of the plaintiff, in the estimation of the court. Another clear exhibition of dishonesty by the plaintiff has been his denial of the fact that he was shareholder of one share in a company called Kokomewah Sdn Bhd when he was questioned on that fact during his cross-examination by learned counsel for the defendants. In a case where the shareholding of Kokomewah Sdn Bhd was established, it was held by the learned judge that the apart from two other shareholders of Kokomewah Sdn Bhd, namely the plaintiff's daughter and his son-in-law, he, the plaintiff, was the third shareholder, albeit for only one share of the company. In the case of *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214 a construction contract
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was awarded by Desa Hatchery, a wholly-owned subsidiary of Koperasi Pembangunan Desa, a statutory body of the government of the State of Sabah, to Kokomewah Sdn Bhd, a company wholly owned by the plaintiff's family, without an open tender. These evidence did not appear to have been considered in the learned judge's grounds of judgment.

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[47] The admission by the plaintiff, under cross-examination to distributing profits from timber concessions to the second-level leadership of Berjaya through a scheme known as the ABC scheme, was also not considered by the learned trial judge. It was the submission by learned counsel for the defendants that the plaintiff in doing so had 'used public assets for the purpose of his own party's political agenda' (see, common core bundle 2, p 211 line 31 to p 212 line 26 (notes of proceedings p 61 line 31 to p 62 line 26, cross-examination of Tan Sri Harris)).

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[48] With respect, we agreed with learned counsel for the defendants that had the learned trial judge appreciated and considered the evidence as alluded to above, he would have found that the pleaded defence of justification would have succeeded.

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[49] Under the circumstances, we found it unnecessary to delve into the issues of whether the defence of fair comment had been established and the issue pertaining to permanent injunction, as the plaintiff had clearly failed to prove his pleaded case as contained in paras 13–14, particularly sub-paras 14.1–14.9 in his SOC. In light of our findings and decision, those issues had been rendered irrelevant.

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[50] The appellate court, as a matter of accepted practice, would not, out of deference, easily disturb the findings or decision of the trial court. This deference stemmed from the observation that the trial court has the audio-visual advantage of having seen and thereby observed the demeanour of witnesses that have appeared before him. But, that having been said, is not a rule of practice that is cast in stone. The appeal court is duty bound to disturb a trial court's decision, if it is apparent that it has been decided against the weight of evidence, sometimes described as a gross misfindings of facts by the trial court. The well-known dictum of Lord Thankerton in *Thomas v Thomas* 1947 SC (HL) 45 at p 54; [1947] AC 484 at p 488 reads:

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The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

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- A [51] It will also be set aside if it is plainly illegal or amounts to a wrong interpretation of a statute in play. Misdirection on point of fact or law in a material way also qualifies an appellate interference. Put simply, a decision of the trial court is liable to be set aside if it plainly wrong. Lord Reed, in the English House of Lords decision in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600 gave clarity as to what is meant by a decision which is plainly wrong thereby inviting the inevitable appellate interference. His Lordship has put it thus:

- C The adverb ‘plainly’ does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

- D [52] At the end of the day, it is measured against whether a reasonable judge similarly circumstanced, would have come to the same decision as did the learned trial judge. Having perused through the records of appeal in this case, we were constrained to say that a reasonable judge so circumstanced would not have decided the way the learned trial judge in this case before us had decided.

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CONCLUSION

- F [53] To recapitulate, we found that the learned High Court judge had erred in his appreciation of the pleaded case of the plaintiff. The pleaded case of the plaintiff especially at paras 13–14 of the SOC is that the ten passages in their natural and ordinary meaning meant the nine cumulative meanings, assigned by the plaintiff as per paras 14.1–14.9.

- G [54] As such, it was incumbent that each of the ten passages be evaluated by the learned High Court judge to ascertain that each of them meant the nine pleaded meanings assigned by the plaintiff.

- H [55] The learned High Court judge failed to do so. We further found from the evidence that the plaintiff had not proved his case.

- I [56] In the upshot, we had unanimously allowed the appeal with costs. The order of the High Court dated 19 May 2017 against the first and second defendants is set aside. The cross-appeal is consequently dismissed. We also ordered costs of RM50,000 for here and below to the defendants, subject to the payment of allocator fees; and the deposits, if any paid, are to be refunded to the defendants.

Appeal allowed with costs of RM50,000 here and below to defendants; cross-appeal dismissed.

Reported by Dzulqarnain Ab Fatar

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